

# Fight these People!

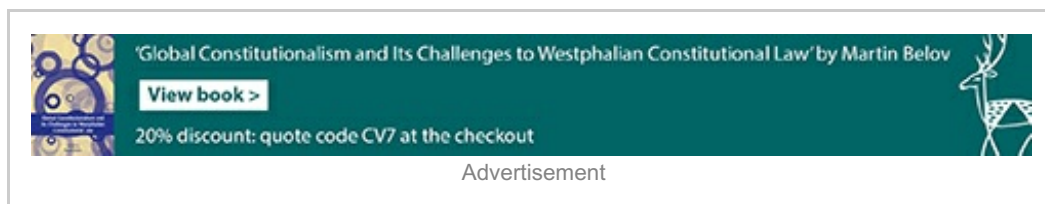
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Maximilian Steinbeis Sa 30 Jun 2018

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We Germans, and I'm not exempting myself here, love the judiciary. We like it orderly and regulated, and when it comes to deciding what we should do, we expect a bunch of black-clad sour-faced judges to look it up for us in the law and in the constitution. There is nothing we dislike more than row and dispute, and therefore we prefer to have the decision what is best for us being handed down to us from a higher place, so that all we have to do is say: It's not our fault, it's just the law.

Perhaps we ought to be almost grateful to the Bavarian rabble-rousers of the CSU these days, for forcing a fight on us, a real, relentless fight about what we care for most. Their demand to let the Federal Home Secretary, CSU chairman Horst Seehofer, unilaterally push back refugees at the German borders is an assault on European multilateralism, and the Bavarian MP Markus Söder, one of the ringleaders of that attack, has made it unmistakably clear that this is precisely what it is supposed to be about: to remake Europe in the image of Orbán. Their coalition partners of the CDU and the SPD are horrified and find this terribly irresponsible, and even in the CSU many seem to be seized with qualms after the EU summit decided to crack down on refugee "secondary migration" and thereby took much of their pretended policy demands away from them. It's hard to see, though, how the CSU will manage to climb down from the tree it had chased itself up before with its brutal rhetorics. But even if they do: I wonder if the CDU should assist their estranged Bavarian *Schwesterpartei* in their retreat. Much as I am usually in favour of peaceful conflict solution – in this case, that would almost seem like a missed opportunity to me.



The last two weeks have made it abundantly clear that the CSU is the political opponent of the CDU in one of the most important questions of our time: whether one finds unilateral, uncoordinated action in the supposed "national interest" a good or a bad thing. If that's not worth a fight, what is? In this matter, a position must be taken. Voters in Germany should get the opportunity to weigh which position convinces them more. And then we'll see who wins and who loses.

Of course breaking up with the CSU is a terribly risky move for the CDU to make. But *not* breaking up with the CSU looks like no less risky an option in view of what is at stake. And in the end, I don't see why the CDU should be the one that ought to avoid this conflict.

Let's fantasize a bit. Imagine the Chancellor found it in herself to flip the switch and go on attack mode. Friends, she says to her surprised party, we didn't want this. We still don't. We went to the brink of self-humiliation to avoid that terrible outcome. But we have to face the truth. Our Bavarian partners for decades, to our greatest dismay, have turned into full-fledged Orbánists. And therefore it's time to part ways with them now, with a heavy heart, but with a courageous mind. As of today, these people are our opponents! Let the boiling rage so many Germans hold against them be the wind that swells our political sails! Let's go out now and fight these people!

The government majority in the *Bundestag* will be temporarily secured with a toleration agreement with the Greens, just for a few months to hammer out an agreement with Macron on the fundamental reform of the EU and the euro zone. Then Parliament will be dissolved at the right time to have the elections coincide with the European elections in May 2019. In this combined national/European election campaign, the new CDU chairwoman Annegret Kramp-Karrenbauer will have a powerful message: Europe is at stake! A choice of destiny! If you want to stop Trump and Orbán, you have to vote for CDU!

The pro-EU majority in Germany is gripped by new political passion, and so is the CDU party base, particularly because there is a lot to gain: In Bavaria, a CDU-led four-party coalition topples the CSU from power, in Hesse the coalition is confirmed in office, and on the day of the federal elections, lo and behold, a CDU-Green majority has emerged. The CDU, whose top priority has always been to keep the chancellory for their own, is happy, so are obviously the Greens, the SPD is irrelevant, the FDP has been finally and well-deservedly torn to shreds, and over in Brussels, a sad-faced Manfred Weber, the out-of-luck "Spitzenkandidat" of what has remained of the EPP, has to relinquish his claim to be next Commission President. What's not to like?

Nothing weakens Orbánism like electoral defeat. At this point in time, there still exists a pro-European majority in Germany that just waits to be mobilised. Even in Bavaria. I am very confident about that. That majority may vanish at some point, as it did in Italy, Hungary, Poland. In that case, Orbánism will take over in Germany, too. And if that happens, the rules of the fight will change fundamentally, anyway. I would rather not let it come to that.

## Two blows

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To return to the judiciary, and the belief that it will save us: This belief has taken a huge blow last week. Two blows, actually. On the one hand, there is the Supreme Court of the **USA**, whose conservative majority certified Trump's constitutional competence to discriminate against Muslim immigrants all day long, as long as he can plausibly pretend to do it on behalf of "national security". On top of that, Anthony Kennedy, the least unlikely among the five majority judges to protect vulnerable minorities, has resigned, which now gives Trump the opportunity to pick another 50-year-old hardliner of the Gorsuch mold, fixate the conservative majority for decades to come, and thus effectively obliterate the Supreme Court as a safeguard against his and/or his successors' tendencies towards right-wing authoritarianism. RALF MICHAELS tells the whole sad story.

The second blow took place this week in Luxembourg. The European Court of Justice is currently pondering on the epochal question of whether EU member states may refuse to

execute arrest warrants from **Poland** because the Polish judiciary lacks the necessary independence to safeguard a fair trial. This case is currently the best hope for all those who still hope for a restoration of the rule of law in Poland. On Thursday, Advocate General Tanchev proposed a line that would basically pull the Court's teeth in that matter, were it to follow his opinion: A national judge that wants to refuse to extradite a wanted person to Poland must not only check whether the judicial system there is still independent enough, but also whether a specific risk arises specifically for the wanted person. That would get the PiS off the hook. PÉTRA BARD will provide an analysis of the Advocate General's arguments shortly.

+++++A Note from University of Leipzig+++++

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*The Chair for European Law, International Law and Public Law at the University of Leipzig is pleased to announce its first Summer School on European Human Rights Protection according to the ECHR and is looking for interested speakers. The official announcement with the exact dates, possible presentation topics as well as further information can be found under the following link.*

*The chair for European Law, International Law and Public Law is looking forward to your application.*

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More on **Poland**: The EU Commission has announced that it will bring infringement proceedings before the ECJ against the imminent compulsory retirement of a substantial number of judges of the Supreme Court. Meanwhile, in an unprecedented move, the Supreme Court takes the law into its own hands and declares open resistance: Judge Stanisław Zabłocki has let the government know that his irremovability from office is a direct result of the constitution, which is why he intends to quit the bench not until the age of 70. Others seem prepared to follow suit. The General Assembly of Judges of the Supreme Court has decided to continue to regard Małgorzata Gersdorf as its President, "mindful of the oath of office we made and allegiant to the Constitution of the Republic of Poland". What the Constitution demands in their case would normally be for the Constitutional Court to clarify, but that formerly respected body has degenerated into a tool of the government itself long ago. This is how bad things are with the rule of law in Poland.

**Hungary**, in the meantime, has amended its constitution to oblige all state officials to protect "Hungary's self-identity and its Christian culture". The fact that Hungary, in the same breath, declares civil aid for refugees a crime and being homeless illegal might be seen as somewhat contradictory. GÁBOR HALMAI sheds light on the purely instrumental way in which Viktor Orbán and his Fidesz Party refer to religion and Christianity.

Back to the **USA**: President Trump announced on Twitter some weeks ago that he considers pardoning himself, thereby effectively immunizing himself against any legal responsibility for whatever crimes and misdemeanors he has committed and still will commit as President. JUD MATTHEWS examines whether this would be legally possible.

DANA SCHMALZ had the opportunity to interview one of the most fascinating and provocative jurists of the US, BERNARD HARCOURT, whose book "The Counterrevolution" explains how much counter-insurgency, i.e. the suppression of real or imagined enemies within, has become the dominant mode of government since 9/11, and not only in the **USA**.

The fact that **France** rejects refugees at the border with Italy is often cited as a model in the German domestic quarrel over these matters. The French Human Rights Commission, however, has taken the view that the push-back is unlawful and violates the fundamental rights of the concerned refugees and migrants. CHRISTOPH TOMETTEN reports (German).

Investor-state dispute resolution tribunals do not enjoy the best reputation, and IOANNIS GLINAVOS used to be a fierce critic, too. But the current reality of sovereign state action has made him think twice.

The European Parliament is currently working on a new copyright directive that will, among other things, enable so-called upload filters. AMÉLIE HELDT reports what this is all about (German).

TOM GERALD DALY has earned tremendous merits with his new DEM-DEC website, which has been launched this week – an immensely helpful resource that collects facts, data, publications and expertise on democratic decline.

And what did the glossator do? Nothing. He let things be. And that's far from nothing, since we are speaking of FABIAN STEINHAUER after all.

## Elsewhere

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MARK GRABER points to the 1898 *Williams v. Mississippi* judgment, in which the **US** Supreme Court saw no mistake nor blame whatsoever in the South's poorly concealed attempts to prevent black citizens from voting. This judgement, in his view, is the actual foil for the current Muslim Ban judgement *Trump v. Hawaii*, even more than the *Korematsu* judgement on the internment of Japanese-Americans in World War II.

The recent European Court of Justice ruling on the **Flemish** ban on Muslim ritual slaughter has caused far less of a stir than the Muslim Ban decision. ANNE PETERS draws a connection to Trump's "These aren't people. These are animals" statement and warns against playing animal protection and human protection off against each other.

JONATHAN ADLER shows how far Trump has moved away from the **US** constitution with his Twitter demand to deport migrants "with no Judges or Court Cases".

RICK LAWSON defends the EU Commission against the accusation that it is not sufficiently determined to tackle the deterioration of the rule of law in **Poland**.

TERESA FREIXES makes a fiery plea for a renewed **Europe** (Spanish).

THOMAS KIENLE is investigating who actually owns our social media data after our death on the occasion a current trial before the **German** Federal Court of Justice (German).

THOMAS PERROUD is concerned about the shrinking access to justice that can be observed in France, the USA and Great Britain (French).

MARTIN DOWNS describes a ruling by the **UK** Supreme Court that it discriminates against same-sex couples to offer them only civil partnership and not marriage instead of both.

DANIELA VITIELLO disentangles the complicated questions of asylum law that the case of the refugee rescue ship Aquarius raises (Italian), and so does from an international law perspective EFTHYMIOS PAPASTAVRIDIS.

GIORGIO REPETTO analyses the judgment of the European Court of Human Rights on the confiscation of illegal buildings in **Italy** (Italian).

ÉRIKA MARÍA RODRÍGUEZ PINZÓN sees **Colombia** on its way back into the past after the right-wing candidate won the presidential elections (Spanish).

That would be all for this memorable week. We survived it, and we will survive the next too, and the one after that. Remember: we have to fight these people! All the best, and take care,

Max Steinbeis

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SUGGESTED CITATION Steinbeis, Maximilian: *Fight these People!*, *VerfBlog*, 2018/6/30, <https://verfassungsblog.de/fight-these-people/>.